

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1101

To be argued by
THOMAS E. ENGEL

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1101

In the Matter of
Grand Jury subpoenas
served on

MARIA T. CUETO and RAISA NEMIKIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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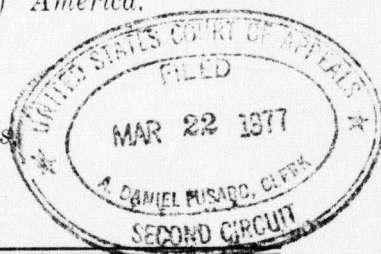


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Preliminary Statement

Maria Cueto and Raisa Nemikin appeal from orders entered on February 26, 1977, and March 5, 1977, respectively, in the United States District Court for the Southern District of New York by the Honorable Marvin E. Frankel, United States District Judge, finding each of them in civil contempt of court as a recalcitrant grand jury witness pursuant to Title 28, United States Code, Section 1826(a).

Motions by both Cueto and Nemikin for stays of Judge Frankel's orders were denied by separate panels of this Court on March 1, 1977, in Nemikin's case and March 8, 1977, in Cueto's case. By order of this Court dated March 8, 1977, the appeals of Cueto and Nemikin are consolidated for briefing and argument.

Statement of Facts

1. The Grand Jury Investigation

At about lunch hour on January 24, 1975, a bomb exploded in Fraunces Tavern in downtown New York City. The bombing killed four persons and injured 53 others. Responsibility for this bombing was later claimed in a communique by a group called the Fuerzas Armadas de Liberacion Nacional Puertorriquena and better known by its acronym FALN.

In April 1975, a grand jury was impaneled in the Southern District of New York to investigate, among other things, the Fraunces Tavern bombing and several other terrorist bombings for which the FALN had also claimed responsibility. During the term of that grand jury, numerous other terrorist bombings occurred in New York, as well as Chicago and Washington, D.C. The April 1975, grand jury term expired on October 28, 1976,* and, just six days later, police officers and agents of the Federal Bureau of Investigation discovered a "bomb factory" in a Chicago apartment that also contained documents and papers linking the bombing paraphernalia—including dynamite, various explosive chemicals, blasting caps, detonator cord, propane tanks, timing devices, batteries—to the FALN and, more particularly to one Carlos Alberto Torres, the owner of the apartment.

* The expiration of the grand jury resulted in the release of Lureida Torres, a witness before the grand jury who on May 13, 1976, was found in civil contempt as a recalcitrant witness by the Honorable Charles L. Brieant, Jr., United States District Judge. That order was affirmed by this Court on the opinion below. *United States v. Torres*, Dkt. No. 76-1226 (2d Cir. June 10, 1976), *aff'g opinion below*, 76 Cr. Misc. M. 11-188).

Among the other items found in the apartment was a letter dated February 3, 1975, to contemnor Cueto in her capacity as Executive Director of the National Commission on Hispanic Affairs of the Protestant Episcopal Church (the "Commission") from a church in San Antonio, Texas.

Law enforcement personnel immediately made efforts to locate Torres after discovery of the "bomb factory," and arrest warrants were subsequently issued for Torres charging him with unlawful possession of an explosive device and unlawful flight to avoid prosecution. As part of their search for Torres, agents of the New York Office of the FBI sought on November 18, 1976, to interview Maria Cueto and her secretary, Raisa Nemikin, with respect to their knowledge of Torres. Both Cueto and Nemikin stated that Carlos Alberto Torres was a member of the Commission, and Miss Cueto identified a photograph of Torres and reported that she had last been in New York on October 26, 1976, just one week before the discovery of the "bomb factory" in Chicago.

On the same day Bishop Milton L. Wood, representing the Executive Council of the National Episcopal Church, stated that the Executive Council desired to cooperate fully with the investigation concerning Torres.

FBI Agents returned to interview Miss Cueto at her residence and Miss Nemikin at her residence, and each woman separately, after being advised of her rights, denied knowing the present whereabouts of either Torres or Oscar Lopez, a close associate of his and a former member of the Commission. Both women denied seeing any FALN communique. Miss Cueto told the FBI agent she had nothing further to say to him and terminated the interview.

Meanwhile, a second grand jury was impaneled on November 9, 1976, to continue the investigation com-

menced by the grand jury that had expired October 28, 1976. From this new grand jury a subpoena *duces tecum* was issued to Bishop Milton L. Wood, Episcopal Church Center, 815 Second Avenue, New York, New York calling, *inter alia*, for production of samples of the typewriters on the Center's premises, information regarding Gestetner reproduction machines at the center, personnel records concerning these contemnors, and financial records of disbursements by the Episcopal Church Center for the reimbursement of travel expenses. Bishop Wood complied with this subpoena.

On January 4, 1977, grand jury subpoenas were issued to Miss Cueto commanding her appearance before the grand jury on January 10, 1977, and to Miss Nemikin commanding her appearance January 14, 1977. When Miss Cueto appeared January 10, she refused to be sworn before the grand jury until she had arranged to retain an attorney. Upon being ordered by the Honorable Lloyd F. MacMahon to be sworn, she again refused, was held in summary contempt, and was incarcerated until the following day when Miss Cueto, represented at this time by Elizabeth M. Fink, Esq. purged her contempt by submitting to the oath before another sitting grand jury but retained her right to move to quash the subpoena issued to her.

2. The Proceedings Before Judge Pierce

The grand jury appearances of both Miss Cueto and Miss Nemikin having been adjourned at their counsel's request,* contemnors moved on January 26, 1977, before the Honorable Lawrence W. Pierce, to quash their sub-

* Miss Nemikin had by this time retained Elizabeth Fink, assisted by Margaret L. Ratner, Susan V. Tipograph, and Daniel M. Meyers.

poenas on the grounds, *inter alia*, that their First Amendment rights (as well as those of the Episcopal Church itself) to free exercise of religion and free association were being violated. Cueto and Nemikin also asserted that the subpoena directed to Bishop Wood—which already had been complied with—was a disguised search warrant directed against them.* The motion was supported by affidavits of Cueto and Nemikin, which recited in detail the interviews of them by the FBI agents, as well as by affidavits of Elizabeth Fink, their attorney, and one Luis Rosado, a consultant to and former member of the Commission who asserted that FBI inquiries about the Commission at the Episcopal Church Center had resulted in his being fired from his consultant position.

In response to these papers, the Government filed two affidavits of Thomas E. Engel, the Assistant United States Attorney in charge of the grand jury investigation. One affidavit was filed and served upon contemnors' counsel, the other was submitted *ex parte* and *in camera*. The open affidavit merely recited the extensive cooperation of Bishop Wood and members of his staff (excepting, of course, Cueto and Nemikin) in mak-

* Contemnors also claimed before the District Court that the subpoenas were an abuse of grand jury process because the grand jury was being used, in effect, as a tool of the FBI. They also claimed that the subpoenas should be quashed because they were part of a pattern of harassment of persons supporting independence for Puerto Rico and similar causes. See Note at page 13, *infra*. Miss Cueto and Miss Nemikin, in addition, claimed that the subpoenas were principally issued to gather information about fugitives. Finally, contemnors sought the right to discovery and inspection of the FBI reports of their interviews, lest they be subject to prosecution for false statement. These claims, all rejected by Judge Pierce, have been abandoned on appeal.

ing documents and records available.* The *ex parte* affidavit, to which was appended the grand jury testimony of Louis J. Vizi, a Special Agent of the FBI, set forth the information in possession of the Government and presented to the grand jury that justified enforcement of the subpoenas even assuming hypothetically that contemnors' assertions of possible infringement on their First Amendment rights required a showing of the propriety of the grand jury proceedings.

On February 4, 1977, after hearing further oral argument on the motion, Judge Pierce issued a careful and reasoned opinion denying the motions in all respects.**

* Significantly, the Engel Affidavit recited Bishop Wood's declaration that to his knowledge one Lydia Lopez was the only member of the Commission who was an Episcopalian. Despite all the assertions by contemnors and their supporters of the spiritual and perhaps pastoral significance of the Commission's work, the fact remains that neither the Commission members nor the supporting staff of Misses Cueto and Nemikin perform ecclesiastical functions nor, of course, do they perform the liturgical, sacerdotal or sacramental functions reserved to the ordained.

** Judge Pierce, before rendering his opinion, considered the affidavits of Bishops Paul Moore, Jr. and Francisco Reuss-Froylan, Bishops of the Dioceses of New York and Puerto Rico respectively, submitted in support of the motions to quash of Cueto and Nemikin. They also sought the quashing of the subpoena directed to Bishop Wood that had already been complied with and another subpoena *duces tecum* directed to Bishop John M. Allin, the Presiding Bishop of the National Episcopal Church, which was withdrawn when voluntary compliance with its requests had been agreed to by the Church and Government. The Diocesan Bishops sought leave to intervene, which relief was denied in endorsement orders dated February 4, 1977; however, Judge Pierce granted the Episcopal Diocese of New York itself the right to intervene on the mistaken factual ground that Misses Cueto and Nemikin were employees of the Diocese, rather than, as they truly are, of the Domestic and Foreign Missionary Society, an administra-

[Footnote continued on following page]

Judge Pierce stated that, quite aside from the Government's *ex parte* submissions, it was clear

"[e]ven from the Movants' own accounts of their FBI interviews . . . that the government is proceeding with care, that the investigation is sharply focused and that specific crimes and specific persons are under investigation."

Cueto and Nemikin were ordered to testify forthwith.*

3. The Contempt Proceedings

A. Raisa Nemikin

On February 14, 1977, Nemikin appeared before the grand jury and refused to answer questions, realleging the grounds of her motion to quash and asserting her Fifth Amendment privilege against self-incrimination.

Her appearance was adjourned until February 18, 1977, at which time an order granting Miss Nemikin immunity under Title 18, United States Code, Sections 6002 and 6003 and ordering her to testify was signed by the

tive organ of the National Episcopal Church. Bishop Moore's affidavit alleged that he viewed the work of the Hispanic Commission, and thus of Miss Cueto and Miss Nemikin, as an "integral part of his ministry." Judge Pierce found no priest-penitent relationship between Bishops Moore and Reuss-Froylan, on the one hand, and contemnors, on the other hand, or between contemnors and Torres. Judge Pierce also found that the Government was seeking to find out what was known about suspected FALN fugitives and was not prying into any alleged confidential relationship between the Diocesan Bishops and contemnors.

* The order was stayed until the close of business February 8, 1977 to give the intervenor Episcopal Diocese an opportunity to appeal the denials of the motions to quash. No appeal was taken.

Honorable Charles H. Tenney, United States District Judge. On the same day, Nemikin reappeared before the grand jury and was asked the following questions:

(1) "Miss Nemikin, when did you last speak or otherwise communicate with Carlos Torres?"

(2) "Miss Nemikin, I will ask you to please identify all funds, monies of the National Commission on Hispanic Affairs to the Protestant Episcopal Church of the United States, which were directed, openly or in secret, to the FALN, in whole or in part, indirectly or directly, and I include in that question all monies which were directed to any member of the FALN?"

(3) "Miss Nemikin, I will ask you please to identify to the Grand Jury any person (*sic*) whom you know who are involved or have claimed responsibility for the dynamite bombing of Fraunces Tavern on January 24th, resulting in the death of four persons."

Miss Nemikin repeated her earlier response varying it only to the extent that she claimed that her Fifth Amendment rights were inadequately protected by the grant of immunity.

Miss Nemikin then reappeared before Judge Tenney at the direction of the foreman of the grand jury. At this time the Government orally moved to have Miss Nemikin held in civil contempt for her refusal without just cause to answer the questions before the grand jury. Judge Tenney adjourned the hearing until February 23, 1977, when the Part One calendar was called before the Honorable Marvin E. Frankel, United States District Judge.

On February 22, 1977, counsel for Nemikin for the first time moved under 18 U.S.C. § 3504 to have the

Government affirm or deny that the questions propounded to Miss Nemikin in the grand jury were the product of illegal electronic surveillance.* The moving papers listed thirteen different telephone locations that were assertedly used by Miss Nemikin or her attorneys or attorneys with whom her attorneys consulted. Judge Frankel ordered that, in addition to the two affidavits submitted by the Government denying the wiretap allegations,** the Gov-

* In support of her motion Miss Nemikin submitted her own affidavit and those of Amy Lobenstein, Michael Ratner (law partner to Margaret Ratner, one of Miss Nemikin's attorneys) and Elizabeth Fink. All of these affiants claimed to have had odd experiences either with their own telephones or when attempting to telephone Ms. Fink. Miss Lobenstein, in particular, alleged that at the inception of the second of two successive phone calls to Elizabeth Fink's roommate, she had heard the conclusion of the earlier conversation played back.

Miss Nemikin also submitted affidavits of the Reverend John F. Stevens, an ordained Episcopal minister, and Carman Hunter, a former employee of the Church's Executive Council. These affidavits supported the notion that all members of the Episcopal Church were "lay ministers," which positions prohibited them in conscience from answering questions about bombings.

** The Government had submitted an affidavit of Mr. Engel, the Assistant United States Attorney in charge of the investigation, denying knowledge of any electronic surveillance on Miss Nemikin and denying that the questions put to Miss Nemikin were the product of such surveillance, and the affidavit of Martin A. Crowe, the FBI agent supervising the investigation of the FALN terrorist bombings, denying the existence of any electronic surveillance on Miss Nemikin. Judge Frankel requested the additional affidavits not because the existence of illegal surveillance had been shown by the moving affidavits or because the Government response was insufficient, but simply because it would be "quickest and simplest" to have the information "without forecasting that it really can or will have any effect on the outcome of the proceeding." (Tr. of Feb. 24, 1977 at 42).

The prefix "Tr." indicates the transcript of the hearing on the date indicated.

ernment submit by February 26, 1977, affidavits of persons having personal knowledge of searches of indices of electronic surveillance maintained in New York and Washington and that these affidavits affirm or deny the existence of illegal electronic surveillance on each of the thirteen telephones listed in Miss Nemikin's motion.

On February 26, 1977, the Government supplied the affidavits requested by Judge Frankel and counsel for Nemikin agreed with the Court that they conformed to Judge Frankel's previous directions. Judge Frankel then found Miss Nemikin in civil contempt. Counsel for Nemikin then objected for the first time that there was no proof of Miss Nemikin's contempt in that the grand jury minutes had not been furnished to the witness. Counsel conceded Miss Nemikin's refusal to answer the questions, however, and was promptly furnished a copy of the grand jury minutes. Judge Frankel stayed his order until 10:00 a.m. Monday, February 28, 1977, when the grand jury would return in order to give Miss Nemikin another opportunity to purge her contempt. On the morning of February 28, in view of Miss Nemikin's continued refusal to answer the questions, Judge Frankel stayed the order until 2 p.m. the same day to permit her to seek a stay from this Court. Argument was held, and after reserving decision until the following morning, this Court (*per* Mulligan, Oakes, CJJ, and Bryan, DJ) denied a stay of the order of incarceration and denied bail, tacitly but necessarily finding that any appeal from Judge Frankel's order was "frivolous or taken for delay" under 28 U.S.C. § 1826(b).

B. Maria Cueto

On March 4, 1977, Maria Cueto appeared before Judge Frankel and was granted immunity identical in form to that of Miss Nemikin and was ordered to testify

before the grand jury. Miss Cueto appeared before the grand jury and was asked the following three questions:

(1) "Do you have any knowledge now about the whereabouts of Carlos Alberto Torres?"

(2) "Miss Cueto, did Carlos Alberto Torres play any part in the bombing of Fraunces Tavern here in New York on January 24, 1975?"

(3) "Miss Cueto, this Grand Jury is trying to find out, among other things, who is responsible for the bombing of Fraunces Tavern that killed four people. Can you tell us the names of any person who participated in the bombing or do you have any information at all with respect to it?"

Miss Cueto answered the first question with a repetition of the objections made in her motion to quash and on the ground that the Fifth Amendment still protected her. She stated in response to the second question that she refused to answer for the reason stated in her first answer but volunteered to "answer some of your (the grand jury's) questions" if the Assistant United States Attorney and the stenographer were not present and she were permitted to be heard "not on the basis of the procedure of the Grand Jury, but as individuals". Miss Cueto reasserted First, Fourth, Fifth, and Sixth Amendment objections to the third question and refused to answer.

Miss Cueto was then directed to appear before Judge Frankel, at which time the Government filed affidavits denying the use of illegal electronic surveillance on Miss Cueto's telephone. The affidavits were submitted by FBI agents who conducted or supervised the search of indices of electronic surveillance in New York, Washington, and Chicago. In addition, affidavits substantially identical to those submitted in the Nemikin proceeding

were submitted by Assistant United States Attorney Engel and Special Agent Crowe. Judge Frankel continued the proceedings until the following day, Saturday, March 5, 1977, in order to allow Miss Cueto to make any further factual submissions she wished. Miss Cueto submitted an affidavit describing her association with the Episcopal Church and seeking to characterize it as a "lay ministry." Judge Frankel rejected the significance of this contention, however, and held Miss Cueto in contempt. Judge Frankel rejected, as Judge Pierce had, Cueto's objection that the Court had relied on the *ex parte* submissions by the Government, and specifically noted that the *ex parte* material did not amount to "a hill of beans". (Tr. of March 4, 1977 at 34.)

Judge Frankel stayed his order until March 7, 1977, in order that Cueto could seek a stay from this Court. This Court (*per* Kaufman, Mullivan, and Smith, JJ) granted a stay for one day to consider written submissions by the parties but denied the stay after hearing argument on March 8, 1977. Miss Cueto surrendered to the United States Marshal that afternoon.

ARGUMENT

POINT I

Contemnors' First Amendment Rights Were Properly Rejected by the District Court.

Cueto and Nemikin claim that their First and Fifth Amendment rights were violated because the District Court improperly considered *ex parte* material submitted by the Government to show the necessity of the questioning of Cueto and Nemikin by the grand jury. As two district judges found, these assertions are without merit.

A. The Proceedings Before Judge Pierce

In their motion to quash the subpoenas, contemnors argued that they should be excused from appearing before the grand jury because their appearance and submission to questioning would violate their rights to freedom of religion and to freedom of association. This argument was supported by Cueto's and Nemikin's affidavits to the effect that they were employed by the National Commission on Hispanic Affairs of the Episcopal Church and that the Commission was engaged in the development of programs and the making of financial grants to the Hispanic community in order to encourage the development of resources, skills, and democratic expression of Hispanic people within the United States. (Affidavit of Maria Cueto, Exhibit "D" to motion to quash; Affidavit of Raisa Nemikin, Exhibit "E" to motion to quash; Pamphlet entitled "The National Commission on Hispanic Affairs of the Episcopal Church", Exhibit "A" to motion to quash.) *

* Related to this argument, contemnors alleged that the subpoenas were part of a pattern of harassment and intimidation of persons who support the Puerto Rican independence movement and who support the right to the release from prison of five Puerto Rican nationalists: Oscar Collazo, imprisoned for the attempted assassination of President Harry S. Truman in 1950, and Irving Flores, Rafael Cancel Miranda, Lolita Lebron, and Andres Figueroa Cordero who were imprisoned in 1954 for shootings in the United States House of Representatives that wounded five Congressmen. Although this claim has been apparently abandoned on appeal, it is significant to note that in the communiqué issued by the FALN claiming responsibility for the latest bombings—that on the eve of the filing of this brief, March 20, 1977, of the New York F.B.I. headquarters and of the American Bank Note Co. and that on February 18, 1977 of the Gulf & Western and Chrysler Buildings—demands for the release of these five were linked with demands for the halting of what was characterized as "the illegal use" of the grand jury.

Judge Pierce, in his opinion of February 4, 1977, denying in all respects the motion to quash, found in pertinent part:

"Accordingly, with respect to the freedom of religion claim, the Court must conclude that even taking all the movants' factual allegations at face value, the actions of the government here do not appear to place any cognizable burden on the free exercise of any religious rights." (Opinion of the Honorable Lawrence W. Pierce, United States District Judge, dated February 4, 1977, hereinafter, "Pierce Opinion").*

Judge Pierce continued his analysis, however, in response to contemnors' contention that the grand jury subpoena request for names of persons attending meetings of the Commission and all personnel of the Commission violated contemnors' and other persons' rights of association,** and found that the associational rights

* It is clear from the foregoing that Judge Pierce did not rely on the Government's *ex parte* submissions in finding that the assertions of violations of their freedom of religion by Cueto and Nemikin were insubstantial in and of themselves. The Court also stated in its opinion that its *in camera* review of the grand jury materials compelled it

"to conclude that the actions of the government in this investigation seek to place no restraint upon what respondents choose to believe in their religion or their politics." (Pierce Opinion at 10-11).

The Court thereby was merely exercising its right and, indeed, duty to supervise the grand jury, *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) and to insure that no grand jury abuse was taking place. *In the Matter of the Grand Jury Subpoena Served on John Doe*, 546 F.2d 498, 502 (2d Cir. 1976).

** The Government had directed a grand jury subpoena *duces tecum* to Bishop John M. Allin, Presiding Bishop of the Episcopal Church, a copy of which was also served on Miss Cueto, but the subpoena was withdrawn as to both Bishop Allin and Miss Cueto

[Footnote continued on following page]

being asserted by Cueto and Nemikin and the Episcopal Diocese justified the requirement that the Government demonstrate a "'compelling interest' sufficient to outweigh the possibility of infringement of associational rights." (Pierce Opinion at 11-12). Judge Pierce then held that through the contemnors' own accounts of their FBI interviews the Government had shown a "substantial connection" between the information sought and the governmental interest. Pierce Opinion at 12. Although Judge Pierce stated that his review of the Government's *in camera* submission indicated that the relationship between membership in the Commission and membership in the FALN was a "pattern . . . which may connect several other persons to the activities under investigation" (*Id.*), Judge Pierce made clear that "even without considering the government's *in camera* submission, the record demonstrates that there is a good faith and legitimate basis for the summoning of these two witnesses." (*Id.* at 16).

Finally, Judge Pierce concluded that there was no ecclesiastical privilege that would justify Cueto's and Nemikin's refusals to testify. There being no allegation of a priest-penitent privilege and no assertion that Cueto and Nemikin were priests, Judge Pierce concluded on the basis of their own affidavits and those of Bishops Moore and Reuss-Froylan that contemnors performed work best described as "social work" and declined to extend the priest-penitent privilege to social workers affiliated with a religious organization. (*Id.* at 10).

when Bishop Allin, by his counsel, agreed to furnishing the materials voluntarily. Affidavit of Kenneth W. Greenawalt sworn to February 3, 1977, at 3. Both contemnors and the intervenor Episcopal Diocese of New York sought to quash the subpoena directed to Bishop Allin, but these motions were denied as moot in view of the withdrawal of the subpoena. Endorsement Order of Judge Pierce dated February 4, 1977.

B. The Proceedings Before Judge Frankel

Having been required to testify, and having been immunized, Miss Nemikin again refused to testify before the grand jury, and, in response to the Government's motion to have her held in contempt, submitted yet further affidavits and made offers of proof seeking to establish that her relationships to the Commission and her activities made her a "lay minister" thus protecting her from being questioned by the grand jury. (Tr. of February 24, 1977 at 2-4). The Government conceded the facts submitted in the affidavits and Judge Frankel concluded that the affidavits contained no evidentiary material that was inconsistent with Judge Pierce's opinion. (*Id.* at 45). Thereafter, counsel for Miss Nemikin sought to relitigate the motion to quash already decided by Judge Pierce on the ground, *inter alia*, that the Government had made *in camera* submissions to Judge Pierce. Judge Frankel concluded as follows:

THE COURT: That question has already been ruled on by Judge Pierce. He looked at the *in camera* materials to see whether the government was on a frolic or whether having in mind the secrecy of grand jury proceedings, he could look at that secret record of an arm of the court and decide that this was a responsible investigation.

He decided it was a responsible and focused investigation and he decided that without deem it necessary or appropriate to expose those *ex parte* materials or to have an evidentiary hearing about them.

First, I have grave doubt that the Part 1 Judges who come here in rotation every two weeks ought to redo each other's work or revise each other's opinions.

Second, whatever view I take about that, I must tell you I find Judge Pierce's opinion a thoughtful, thorough and cogent opinion and I agree with it. So I don't know why I should hold an evidentiary hearing on a subject that has already been ruled by the prior judge sitting in Part 1. (*Id.* at 11-12)

Counsel for Miss Nemikin then argued that more due process rights accrued to the witness during a contempt hearing on a motion to quash, and among those rights, counsel asserted, was the right to view the materials submitted *in camera* by the Government. Judge Frankel rejected this attempt to relitigate Judge Pierce's order under the guise of seeking inspection of secret grand jury matters:

THE COURT: Now, look, when a woman or a person of any sex is called before a grand jury and asked about bombings in which life or property have been placed in jeopardy and the question is, does the prosecuting official have a responsible basis for putting such questions about such serious matters, or is he trampling on First Amendment rights, I think the witness is adequately protected, given the right of appeal if a supposedly impartial judge looks at the basis for putting such serious questions about such serious matters and says that there is enough basis, let the person answer.

Similarly, if a priest were asked did he see a murder in his cathedral and this was asked wildly and irresponsibly it might be an invasion of First Amendment freedoms that a judge ought to be sensitive to, but if a judge then looked at the materials on which the prosecutor swore he was asking the questions and it looked as though

somebody had indeed killed somebody in the cathedral and the priest had indeed possibly seen it, then I don't think anybody's religion is hurt or anybody's religious freedom is impaired if the priest under oath says yes or no, he did or did not see the murder.

Now that analogy may not be fair, but it seems adequate to me. I don't see why Miss Nemikin's First Amendment rights have become in some way greater when a judge has carefully looked at her motion to quash and says no, I won't quash. You must go ahead and answer. And then she decides no, she won't answer. So she has another judge and another step and now we call it contempt, because at some point the court's process must be made effective.

I don't see any reason in any of that for retracing the ground or doing the job in a different way. (*Id.* at 12-13).

Finally, Judge Frankel found, in explicit agreement with Judge Pierce, that Miss Nemikin's affidavit submitted in support of her motion to quash provided the Government with sufficient foundation to inquire as it had inquired "without reference to any *ex parte* materials." *Id.* at 16.

On the proceedings concerning Miss Cueto's contempt, Judge Frankel permitted all the submissions made on behalf of Miss Nemikin to "be deemed to have been made and given on behalf of Ms. Cueto" (Tr. of March 4, 1977 at 20). When counsel repeated their need for the papers submitted *ex parte*, Judge Frankel observed that, with respect to the reasons why he held Miss Nemikin in contempt and he would probably hold Miss Cueto in contempt, the *ex parte* submissions did not "amount to a hill of beans" and that if his decision had been premised on

those submissions, the judge would have made them available to the witness (Tr. March 5, 1977 at 34).

C. The *Ex Parte* Materials Were Properly Submitted to the District Court

Although Judge Pierce and Judge Frankel repeatedly made clear that they in no way relied upon the Government *ex parte* submissions in denying the motion to quash or in finding Miss Cueto and Miss Nemikin in contempt, contemnors complain to this Court that their rights were violated by the Government submissions.* This claim is wholly without merit.

The *ex parte* submissions of the Government, consisting as they did of the affidavit of Mr. Engel, the prosecutor in charge of the investigation, and the grand jury testimony of Special Agent Louis J. Vizi, were submitted as both district judges found to show the "substantial connection" that Judge Pierce found between the information sought and the governmental interest. Pierce Opinion at 12. As such, they were perfectly proper in aiding the trial judge in his supervision of the grand jury and to insure that no prosecutorial or other abuse was occurring. *In the Matter of the Grand Jury Investigation (General Motors Corporation)*, 32 F.R.D. 179 (S.D.N.Y. 1963) (Edelstein, Ch. J.), *appeal dismissed*, 318 F.2d 533 (2d Cir., *cert. dismissed*, 375 U.S. 802 (1963)). The district judge is vested with considerable discretion in his consideration of the disclosure of the grand jury's purpose once a challenge is made. *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 965 (3d Cir. 1975). Use of

* This Court must reject this claim as wholly speculative and illusory in view of the sure expressions of both Judge Pierce and Judge Frankel that Cueto's and Nemikin's own affidavits provided more than sufficient basis for their being called, even considering their First Amendment claims.

in camera inspection of grand jury minutes and *ex parte* affidavits are appropriate avenues of inquiry open to the Court. *General Motors, supra*, 32 F.R.D. at 181.

Moreover, the matters submitted to Judge Pierce and Frankel constituted a "matter occurring before the grand jury" and, under Rule 6(e), F. R. Cr. P., these matters are secret, except in very limited circumstances. In *re Biaggi*, 478 F.2d 489 (2d Cir. 1973).^{*} Under these circumstances, a "particularized need" or "compelling necessity" for disclosure of grand jury matters must be made before it may be justified. *Pittsburgh Plate Glass Co. v United States*, 360 U.S. 395, 400 (1957); *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958). *General Motors, supra*, 32 F.R.D. at 180. No such showing was made here, and in the absence of such showing, the policy of secrecy "must not be broken". *United States v. Proctor & Gamble, supra*.

This Court has only recently upheld the propriety of submitting documents and testimony occurring before the grand jury in support of a motion for contempt of an attorney, and, in doing so, denied the right of the attorney's client to have these matters disclosed. In *the Matter of A Grand Jury Subpoena Served Upon David Doe*, Dkt. No. 77-1047, Opinion at 5, n.5, 7. Further, in a case cited with favor therein, *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976), the district judge conducted an *ex parte*

^{*} The reasons for this secrecy are manifold and well known, and they include the interest of the Government in not disclosing its investigation; the interest of witnesses who may have been examined on all manner of subjects or who may fear reprisal; the similar interests of persons whose names for whatever reason have appeared in the testimony; and the interests of the grand jurors themselves. See *In re Biaggi, supra*, 478 F.2d at 491-92. Judge Frankel, of course, recognized these ancient obligations. Tr. of March 5, 1977 at 29, 34.

hearing to determine whether the Government had a *prima facie* foundation in fact for requiring the production of certain documents before the grand jury upon claims both of attorney-client privilege and work-product privilege. The witness challenged the propriety of the *ex parte* proceedings, and, thereafter, upon being ordered to produce the documents, refused to do so with the result that he was held in civil contempt pursuant to 28 U.S.C. § 1826(a). The witness appealed the order of contempt, and the Court of Appeals held that the district court did not abuse its discretion in holding an *ex parte* hearing on the question of *prima facie* cause. *Id.* at 738. The Tenth Circuit followed the recent Supreme Court pronouncements in *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Dionisio*, 410 U.S. 1 (1973), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), which hold in different language but to the same effect that the proceedings relating to the enforcement of a subpoena may not be converted into a "mini-trial," *United States v. Dionisio*, 410 U.S. at 17 or into "litigious interference," *United States v. Calandra*, *supra*, 414 U.S. at 350, or embroilments in "preliminary and factual determinations with respect to whether the proper predicate has been laid," *Branzburg v. Hayes*, *supra*, 408 U.S. at 705. The Tenth Circuit in *In re September, 1975 Grand Jury Term*, *supra*, 532 F.2d at 737 noted: "The contest of a subpoena may not be converted into a preliminary trial."

In contrast to the precedent and the foregoing common-sense expressions of the function of the grand jury, contemnors claim support from inapposite and dated cases that do not comprehend the thrust of recent Supreme Court holdings. In *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972), the Court relied heavily on the Seventh Circuit holding in *Mara v. United States*, 454 F.2d 580 (7th Cir. 1971), which was the companion case to *United States v. Dionisio*, *supra* and which was

reversed summarily on the reasoning of *Dionisio* in *United States v. Mara*, 410 U.S. 18 (1973). The *Dinsio* Court also relied on its own opinion in *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), a case (also cited by contemnors) limited severely by the opinion on the petition for rehearing, *supra*, 466 F.2d at 1090, issued in light of *Branzburg*, *supra*, the impact of which, handed down as it had been one day before the initial opinion in *Bursey*, was not adequately weighed by Judge Hufstedler. In any event, Judge Pierce below cited *Bursey* and found that the Government had complied even with its dubious dictates. The other cases cited by appellants deal with other proceedings and other times and do not merit labored distinction here.

D. The First Amendment Rights of Cueto and Nemikin Were Adequately Protected

Without reference to the *in camera* submissions of the Government, it is clear that Judge Pierce and Judge Frankel fully and thoroughly considered the First Amendment claims here and made reasoned judgments that the claims were nugatory. Those conclusions, made entirely upon the submissions of contemnors and reviewed initially by separate panels of this Court in the application of Nemikin and then Cueto for stays of the orders of confinement, are not seriously challenged and should not now be disturbed.

POINT II**The Government Adequately Denied that the Questioning of Cueto and Nemikin Before the Grand Jury was the Product of Electronic Surveillance.**

Cueto and Nemikin contend that they have just cause to refuse to answer the questions propounded to them before the Grand Jury because the Government inadequately denied that the questions were derived from illegal electronic surveillance. On the contrary, the Government's denials of any electronic surveillance, especially in view of the flimsy allegations that any wiretapping of either witness or their counsel had occurred, were not only adequate but supererogatory.

Having been ordered to testify twice before the grand jury, once by Judge Pierce in denying her motion to quash and then again by Judge Tenney in granting her immunity pursuant to 18 U.S.C. §§ 6002-6003, the contemnor Nemikin suddenly moved to have the Government disclose the existence of any electronic surveillance on her counsel on telephones located in premises in which she or they claimed to have an expectation of privacy. Unsparing in her attempt to hamstring the grand jury, Nemikin listed the following as telephones and premises in which she and her counsel claimed an interest and which she asserted the Government was obliged to affirm or deny the existence of electronic surveillance:

1. Elizabeth M. Fink, Esq.
(residence)
22 Park Place
Brooklyn, New York 11217
(212) 789-6908

2. Susan V. Tipograph, Esq.
(residence)
102 West 14th S.
New York, New York 10011
(212) 691-1846
3. Margaret L. Ratner, Esq.
(residence)
13 Gay Street
New York, New York
(212) 924-5661
4. Margaret L. Ratner, Esq.
(office)
351 Broadway
New York, New York
(212) 411-4118, 4119
5. Daniel L. Meyers, Esq.
(office)
390 Madison Avenue
New York, New York 10017
(212) 687-3118
6. Steven Bernstein, Esq.
(former residence of Ms. Fink)
23 S. Elliot Place
Brooklyn, New York
(212) 855-2078
7. Jessie Berman, Esq.
(office-phone used by movants' attorneys)
351 Broadway
New York, New York
(212) 431-4600

8. Raisa Nemikin
(former residence)
35-36 76th St. #622
Jackson Heights, Queens 11372
(212) 639-8682
9. Maria Cueto
(office)
815 Second Aveune
New York, New York
(212) 867-8400
10. Raisa Nemikin
(office)
815 Second Avenue
New York, New York
(212) 867-8400
11. Center for Constitutional Rights
(consulting attorneys)
853 Broadway—14th Floor
New York, New York
(212) 674-3303
12. Dennis Cunningham, Esq.
(consulting attorney)
c/o People's Law Office
110 S. Dearborn
Chicago, Illinois
(312) 236-3504
13. Michael Deutsch, Esq.
(consulting attorney)
West Town Community Defender
Office
2405 W. North Avenue
Chicago, Ill.
(312) 278-6706

Supporting the motion were affidavits of Nemikin, her attorney Ms. Fink, and two others describing a variety of incidents claimed to have been experienced by them during telephone conversations.* These affidavits included statements by herself and by her counsel that they had heard on unspecified dates since November 1976 in Ms. Nemikin's case and since January 14, 1977, in Ms. Fink's case an unspecified number of sounds—including clicks, buzzes, and loud, shrill whistles—that gave rise to their belief that they were the subject of illegal electronic eavesdropping. Their suspicions were heightened by the Affidavit of Amy Lobenstein, an individual apparently unrelated to this litigation, that claimed that she heard a truncated "instant replay" of a conversation she had had on February 6, 1977, with Ms. Fink's roommate Judith Clark. Finally, Michael Ratner, Esq., claimed that in 1974 the FBI stated that his voice had been overheard on what was characterized as a national security wiretap. In response thereto, the Assistant United States Attorney in charge of the grand jury investigation and the Special Agent in charge of the FBI investigation filed affidavits denying any knowledge of wiretaps or other electronic surveillance and denying that the questions put to Miss Nemikin originated therefrom.** Without deciding that

* Many of the incidents referred to in the affidavits preceded February 4, 1977, the date Cueto's and Nemikin's motions to quash their original subpoenas were denied by Judge Pierce. No motion or request seeking disclosure of electronic surveillance was made at that time, which suggests, we submit, that Cueto, Nemikin and their counsel were more interested in raising this spurious issue as late as possible so that these proceedings could continue to be delayed and obstructed.

** Identical responses furnished in *United States v. Torres*, Dkt. No. 76-1226 (2d Cir. June 10, 1976), *aff'g opinion below*, 76 Cr. Misc. (M. 11-188), were held sufficient in upholding on Judge Brieant's opinion below the contempt order of another witness called to testify about her knowledge of FALN activities. These responses also conform to the requirements set out in *United States v. Grusse*, 515 F.2d 157, 159 (2d Cir. 1975) (Lumbard, J. concurring). See also *In re Buscaglia*, 518 F.2d 77, 78-79 (2d Cir. 1975).

the Government's response was inadequate and making clear that he was acting merely out of an excess of caution (Tr. of Feb. 24, 1977 at 41-43), Judge Frankel ordered the Government to provide affidavits of persons having personal knowledge of searches of FBI electronic surveillance indices maintained in New York and Washington, D.C. and affirming or denying the existence of illegal electronic surveillance or national security wiretaps on all of the thirteen telephones and premises listed in the *Nemikin* motion papers. (*Id.* at 45).

Two days later, the Government submitted three affidavits of FBI personnel denying the existence of any electronic surveillance on any of the telephones listed from the period November 1, 1976, to the date of the searches of the indices.* Counsel for *Nemikin* and the District Court agreed that the affidavits conformed to the Court's order. (Tr. of Feb. 26, 1977 at 3-4). On the hearing of the Government's motion with respect to the contempt by Miss Cueto, the Government submitted affidavits substantially identical in form to those submitted in the *Nemikin* proceedings denying FBI electronic surveillance of Miss Cueto's telephone.** Miss Ratner, one

* One affidavit was submitted by Donald H. Roberts, an FBI Supervisor in Washington, D.C., who instructed that local check of the national indices in Washington be made. A second affidavit of Special Agent Thomas J. Terjeson of the New York Office was submitted describing his search of the local New York indices. A third affidavit of Special Agent Louis J. Vizi, described receipt on a telecopier by the New York FBI Office of an affidavit sworn to by FBI agents Caryl E. Shupe and William E. Dyson, Jr. of the Chicago Office. All of these affidavits denied the existence of FBI electronic surveillance on the premises listed.

** Affidavits of Assistant United States Attorney Engel and Special Agent Crowe were again submitted denying that the question put to Miss Cueto were the product of illegal electronic surveillance. Further, the affidavit of Special Agent Louis J. Vizi of the New York office describing his check of the local indices and appending telecopies of Supervisor Roberts in Washington and Special Agent Dyson in Chicago was submitted.

of Miss Cueto's counsel, complained that the Government's denial of wiretaps was based on hearsay, but the contention was rejected by Judge Frankel, who had before him the identical Government responses and observed that "the case of Miss Cueto is identical with the prior case of Ms. Nemikin." (Tr. of March 15, 1977, at 47).

Before turning to Cueto's and Nemikin's scattergun claims respecting the alleged inadequacy of the Government's denial of electronic surveillance, it should be pointed out that Judge Frankel granted the witnesses more than they were legally entitled to in even requiring the Government to affirm or deny their allegations of electronic surveillance.* This Court only recently held in *In re Millow*, 529 F.2d 770 (2d Cir. 1976), that a witness must set forth at least a "colorable claim" of unlawful wiretapping before the Government is required "to disrupt grand jury proceedings and check thoroughly the applicable agency records." *Id.* at 775. Contemnors' allegations fail to meet even this minimal standard.

Taken as a whole, these allegations of suspicion of unlawful electronic surveillance are so flimsy and so insubstantial that they required neither that a hearing be held nor even that the Government respond to the allegations since the allegations, vague as they are, describe in large part nothing more than the ordinary experiences encountered by any telephone user, particularly one living in a large urban area such as New York City. *In re Vigil*, 524 F.2d 209, 214 (10th Cir. 1975). The allegations of the Lobenstein affidavit purport to establish that a conversation between herself and Ms. Fink's roommate was recorded, presumably by someone

* Judge Frankel himself recognized this point. (Tr. of Feb. 24, 1977 at 41-43).

other than Ms. Clark. This allegation in no way establishes, however, that electronic surveillance has been directed toward Ms. Fink, Ms. Nemikin or any other of the myriad counsel who have appeared in this case. There was no allegation that either Ms. Clark or Ms. Lobenstein are attorneys admitted to practice, that they act on behalf of Ms. Fink or Ms. Nemikin or anybody else associated with this case. *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973) (requiring that the affiant must set forth the identity of the persons with whom the *lawyer* (or *his agents or employees*) were communicating at the time the alleged surveillance took place). There was further no allegation that the conversation Ms. Clark and Ms. Lobenstein were conducting had anything at all to do with Ms. Nemikin or any of her attorneys or associates.*

Mr. Ratner's affidavit is simply irrelevant to the determination of this case. He avers that the FBI admitted that he had been the subject of a wiretap four years ago, a time not only before these witnesses were subpoenaed but also before the bombings about which they were called had occurred. There was nothing, in short, before Judge Frankel that showed that the FBI or other law enforcement agency had attempted to conduct electronic surveillance on either Ms. Nemikin or her lawyer.

* The allegations of hearing some part of a conversation played back was also made in *In The Matter of Lureida Torres*, 76 Cr. Misc., (M11-188) *aff'd on opinion below*, Dkt. No. 76-1226 (2d Cir. June 10, 1976), where Ms. Torres was held in contempt by the Honorable Charles L. Brieant, Jr. for refusing to answer questions about the FALN before a grand jury. In that case, Jose Antonio Lugo, an attorney appearing for Ms. Torres alleged he had heard an echo during a telephone call with a friend accompanied by the inevitable clicks. The claim was rejected as insufficient by Judge Brieant, whose judgment and opinion were affirmed on appeal.

In any event, even assuming *arguendo* that the windmills Nemikin and Cueto have erected were sufficient to require the Government to tilt with them, the denials of Electronic surveillance on Cueto, Nemikin and their counsel were wholly adequate to negative all allegations and to require them to testify or be held in contempt.

Contemnors' contention that the Government's response contained a "highly significant omission" (Br. at 33) and is inadequate because it was not based upon a denial of electronic surveillance by law enforcement agencies other than the FBI*, conveniently overlooks that it is not, and has never been, the Government's obligation to satisfy the witness that he or she has not been the subject of any conceivable electronic surveillance. The Government's burden is limited to satisfying the Court that the Government's questions to the witness are not derived from the results of electronic surveillance. See *In re Buscaglia, supra*; *United States v. Grusse, supra*. See also *United States v. Van Orsdell*, 521 F.2d 1323, 1325 (2d Cir. 1975); *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974). As Judge Lumbard observed in his opinion concurring with Judge Timbers' opinion for the Court in *Grusse*:

"It must be remembered that any electronic surveillance by the Government is relevant only if it is somehow used in formulating questions that the grand jury intends to ask. Thus, surveillance conducted by the Government, the result of which were not known to the agents investigating this case, would not be relevant." 515 F.2d at 159.

* Again employing their limitless imagination, counsel for Cueto and Nemikin suggests that all agencies of the federal government that conduct electronic surveillance and all agencies of all state and local jurisdictions that conduct electronic surveillance should have been canvassed for electronic surveillance of both contemnors and their counsel.

Here, there can be no doubt that the Government's affidavits conclusively demonstrated that electronic surveillance had not been the basis for the questions put to Cueto and Nemikin in the grand jury. First, the Assistant United States Attorney in charge of the grand jury investigation categorically stated that nothing used by him to formulate the questions indicated in any way that it might have been derived from intercepted telephone conversations involving either witness. Second, the questions themselves concern facts in the public domain, not private facts or facts suggesting some kind of covert source of information.* Finally, it is clear that Cueto and Nemikin, by admitting their recent association with Torres, prior to the issuance of any subpoena, provided the basis, if need there have been, for the issuance of a subpoena.

Cueto and Nemikin argue that in this case more is required of the Government than a denial by the FBI and the United States Attorney's office, because other law enforcement agencies, especially the New York City Police Department, investigating FALN activities may have supplied information to the FBI in connection with its investigation. This information, contemnors speculate, may have been derived from electronic surveillance of them and presented to the FBI and United States Attorney's office in a form disguising its source. Such surmises, clearly theoretical, if not fanciful, in the face of the Government's affidavits, do not provide just cause for

* Judge Frankel observed that the questions put to Miss Nemikin "could have been formulated by any reasonably attentive newspaper reader. . . ." (Tr. of Feb. 26, 1977 at 4). Contemnors dispute with this remark (Br. at 34) ignores the following: (1) the Fraunces Tavern bombing was and remains notorious; (2) the fugitivity of Carlos Torres after the discovery of the "bomb factory" was the subject of a federal warrant; and (3) contemnors themselves prior to the issuance of any subpoena identified Carlos Torres as a member of the Hispanic Commission.

Cueto and Nemikin to refuse to testify. In light of "the strong public policy of this Circuit of not permitting disruption of grand jury proceedings absent compelling reasons," *United States v. Grusse, supra*, 515 F.2d at 158 (Timbers J.), the Government "need not preclude every possibility of taint" before a witness may be compelled to give testimony, particularly in a case of such overriding public importance as this one." In re *Testa*, 486 F.2d 1013, 1017 (3d Cir. 1973), *cert. denied sub nom. Testa v. United States*, 417 U.S. 919 (1974).

Contemnors also claim that the Government's denial was inadequate, because, they allege, the electronic surveillance indices maintained by the FBI are inadequate. The only support for this allegation are unsupported surmises (Br. at 38) and an affidavit of Linda Backiel, an attorney recounting her experience assisting in the representation of one Jay Weiner in a case evidently reported as *United States v. Weiner*, 418 F. Supp. 941 (M.D. Pa. 1976). Read with regard for the admitted purpose of the affidavit and the limited knowledge and experience of the affiant, the affidavit suggests little more than that, although the FBI indices contain the names of the telephone subscribers and the names of identifiable persons participating or mentioned in conversations over the telephone, the names of unidentifiable persons are not indexed. That that would necessarily be the case hardly seems surprising. Equally obvious, however, is the fact that if Cueto and Nemikin or their counsel were such unidentifiable persons in an intercepted call, it is highly unlikely that the conversation would ever come to the attention of the prosecution, let alone be utilized in the preparation of questions for the Grand Jury.

Contemnors also claim that the Government's affidavits themselves were an inadequate denial of electronic surveillance because they were based upon hearsay rather

than upon the knowledge of the affiant. As Judge Frankel found, the affidavits conformed to the Court's directions of the previous hearing. (Tr. of Feb. 14, 1977 at 45, Tr. of Feb. 26, 1977 at 3). Counsel conceded conformity below. (*Id.* at 4). Moreover, this claim is particularly deficient in view of this Court's acceptance of less detailed affidavits in *United States v. Van Orsdell*, *supra*, *In re Buscaglia*, *supra*, and *United States v. Grusse*, *supra*.*

Absent at least some credible suggestion by counsel that the questioning before the Grand Jury appears to be a possible fruit of their conversations, which plainly is not the case here, a mere theoretical possibility that electronic surveillance of conversations involving the witnesses or their counsel were used to question is clearly an insufficient basis to vacate the contempt order. Here, the affidavits of counsel provide no factual basis for a suggestion that conversations over their telephones concerning Cueto or Nemikin were intercepted. No allegation was made in any affidavit, or at any hearing below, that any questions asked of either witness appeared to be the result of conversations counsel might have had between themselves or with anyone else.** Thus, Cueto

* Appellants' lame distinction of *Grusse* on the ground that in *Grusse* a hearing was held where "the government produced testimony, subject to cross-examination by appellants' counsel" ignores the fact that the only witness was the Assistant United States Attorney conducting the investigation. He had submitted the only affidavit denying electronic surveillance, and the hearing established merely that the prosecutor's inquiry "had been directed solely to a Special Agent of the Federal Bureau of Investigation with supervisory responsibilities for this matter." *In re Grusse*, 402 F. Supp. 1232, 1235 (Conn. 1975). In the instant case, the FBI affidavits merely established what the hearing in *Grusse* established.

** The lack of such an allegation distinguishes the situation here from that in *In re Quinn*, 525 F.2d 222 (1st Cir. 1975), cited by the contemnors. In *Quinn*, one of the questions propounded to the witness before the Grand Jury concerned a telephone conversation with his attorney which, the witness alleged, must have been overheard illegally on the witness' telephone.

and Nemikin failed even to meet the legal standard announced in *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973), which they have urged this Court to adopt (Br. at 35), because they have failed to "make a prima facie showing that good cause exists to believe that the witness' counsel was subjected by someone to illegal surveillance in connection with the Grand Jury proceeding in which the witness is involved." See *United States v. See*, 505 F.2d 845, 856 (9th Cir.), *cert. denied*, 420 U.S. 992 (1974); *United States v. Vielguth*, 502 F.2d 1257, 1260 (9th Cir. 1974).

Accordingly, Judge Frankel's findings that the electronic surveillance checks adequately safeguarded contemnors from any genuine possibility that their questioning was based upon surveillance of them or their counsel was not erroneous.

It remains only to comment briefly on the nature of the claims of illegality raised in this case. We respectfully submit that too often a claim of illegal electronic surveillance made by a Grand Jury witness is merely a device to obstruct a Grand Jury investigation and to attempt to justify a refusal to testify, the true basis of which has no relationship whatsoever to electronic surveillance. The Grand Jury's investigation in this case concern the most callous of criminal conduct—terrorist bombings of public places that have resulted in the loss of innocent lives. To avoid providing testimony that may lead to the apprehension of those who have engaged in this conduct in the past, continue to engage in it as this case has been heard, and threaten to engage in it again, Cueto and Nemikin have raised claims of electronic surveillance that are without the slightest factual basis. Their claims, we respectfully submit, should be promptly and categorically rejected.

POINT III

Contemnors' Other Claims Are Frivolous.

Cueto and Nemikin claim as well that the findings of their contempt should be reversed because (a) the trial court should have treated the proceedings as criminal contempt proceedings under F. R. Crim. P. 42(a) and (b) the District Court erred in refusing to hold a hearing on their claim that the subpoena served upon and complied with by Bishop Milton Wood operated as a search warrant. Both these claims are utterly frivolous.

A. The Proceedings Below Were Civil Contempt Proceedings and Proof of the Contempt of Cueto and Nemikin Was Conceded

At the hearing on February 26, 1976, eight days after the witness Nemikin initial refused to testify, she claimed that she could not be held in contempt because she had not been furnished a copy of her grand jury testimony. The following colloquy occurred:

THE COURT: What do you want to see in it, whether she refused to answer?

MS. FINK: We don't know what the stenographer——

THE COURT: Is there any issue about her refusal to answer at this point?

MS. FINK: *No. Miss Nemikin has refused to answer the questions in front of the grand jury.*

THE COURT: Mr. Engel gave you and me in a letter* the substance of the questions she refused

* By letter of February 22, 1977, Assistant United States Attorney Engel stated to the Court, with a copy to Nemikin's counsel, that he had "refrained making a copy of the testimony available to defense counsel until an appropriate order under Rule 6(e) F.R. Crim. P., enters."

to answer, and you know and I know that as each question was asked of her, she came out and spoke to you and told you what the question was and she went back in and she refused to answer it, and that is all there is in that transcript, as you well know.

MS. FINK: Yes, I understand, your Honor, but procedurally, at least for the purposes of this hearing, we should have an adversary proceeding——

THE COURT: I asked what she had to show on Thursday. You don't have an adversary proceeding just to beat your gums. You have an adversary proceeding when there is something to be adverse about . . . (Tr. of Feb. 26, 1977 at 10-11). (Emphasis added).

During proceedings March 4, 1977, before Judge Frankel, the Government moved to hold Miss Cueto in contempt and repeated the exact three questions asked of Miss Cueto and the substance of her answers. Although Cueto's counsel conceded the accuracy of the recitation of the questions asked, she stated that the answers were somewhat different. (Tr. of March 4, 1977 at 5). The Court then inquired what her grounds were for refusing to answer, and these were stated by counsel at contemnor Cueto's wish. (*Id.* at 5-9). She then demanded a copy of the grand jury transcript. The following colloquy ensued:

THE COURT: Her answers, you have just told me, speaking for her, because she asked that you speak for her, were refusals to answer.

MS. FINK: Yes.

THE COURT: All right. Then that's it. And if you want to rephrase them, she is sitting right

there and we are making a record, and the United States Attorney has consented that it be a public record, and whether or not he consented, I would be prepared to so order.

So if she wants to rephrase her refusals, let her do it right here before me. I don't see any point in it. But if you thing that means something, do it.

MS. FINK: No.

THE COURT: But let's not play any games of any kind about transcripts that nobody needs and that have not even been typed up and that don't need to be typed up. (Tr. of March 4, 1977 at 13).

Contemnors now claim that, in addition to the procedural safeguards of notice and a reasonable time to prepare a defense which are theirs under Rule 42(b), *In re Sadin*, 509 F.2d 1252, 1255 (2d Cir. 1975), they are entitled to be treated as if they were being tried for criminal contempt. This contention ignores both the facts and the law.

The proceedings before the grand jury and in the District Court make it entirely clear that contemnors were cited for *civil* contempt—that is, they were ordered confined until such time as they answered the questions posed to them or the term of the grand jury expired. As such, the provisions of Rule 42, dealing with criminal contempts, are inapplicable. This distinction was explored in *Shillitani v. United States*, 384 U.S. 364, 368-69 (1966). The purpose of civil contempt is simply to compel the witness to answer questions validly posed to him; since "the keys of the prison [are] in their own

pockets," * *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902). quoted in *Shillitani v. United States*, *supra*, 384 U.S. at 368, the procedural guarantees are different than for criminal contempt. Criminal contempt, on the other hand, effects a punishment on the witness for the crime of contempt; once the contempt has occurred and has been adjudicated, the accused no longer has the option of compliance in order to effect his release.

Both *Harris v. United States*, 431 U.S. 162 (1965), and *United States v. Wilson*, 421 U.S. 309 (1975), concerned criminal contempts, as the opinions expressly noted. See, e.g., *United States v. Wilson*, 421 U.S. at 317, n. 9. Indeed, the procedural guarantees found necessary in *Harris*—for example, to insure that "[w]hat appears to be a brazen refusal" is not in fact "a case of frightened silence" prior to the imposition of an irrevocable period of incarceration—are simply inapplicable here, where at any time the witnesses may procure their immediate release from confinement.

Finally, it should be noted that while no one—including the contemnors—ever discussed the applicability of Rule 42(b) procedures in the District Court, the procedures actually followed there provided contemnors with all of the elements of notice and opportunity to be heard and present evidence required in Rule 42(b) proceedings.** See *Harris v. United States*, 382 U.S. at 165-66.

* Judge Frankel so observed in holding Miss Nemikin in contempt after which hissing from the audience forced the warning that another such outburst would compel him to have the courtroom cleared. (Tr. of Feb. 26, 1977 at 6-7). See also Tr. of March 4, 1977 at 14-15).

** Contrary to the statement in their Brief at 30, contemnor Cueto has been allowed access to the grand jury minutes of the questions asked of her.

Indeed, in expanding the resolution of a crystal-clear issue on the duty to respond to questions of such overwhelming urgency and importance into months of ceaseless litigation, contemnors have themselves demonstrated the completeness of the procedural regularity with which they were treated.

B. The Subpoena Served Upon and Complied With By Bishop Milton Wood Was Not a Search Warrant Directed Against Contemnors

In their initial motion to quash their own subpoenas, contemnors also moved to quash the subpoena served upon Bishop Milton L. Wood and for an order suppressing the materials surrendered by Bishop Wood. The denial of this latter relief is alleged to have tainted the grand jury proceedings and to have afforded contemnors "just cause" to refuse to answer questions before the grand jury. The contention, rejected in a concise endorsement order by Judge Pierce, is utterly without merit. (Endorsement Order of Judge Pierce Feb. 4, 1977).

The subpoena served on Bishop Wood called not for the personal property of contemnors as they allege before this Court (Br. at 41), but for samples of typewriting, information with respect to Gestetner reproduction machines, Church personnel records relating to contemnors, and certain financial records dealing with the reimbursement of travel expenses. Bishop Wood voluntarily complied with the subpoena after service, and neither he nor the National Episcopal Church sought modification or other action with respect to the subpoena.

In his endorsement order, Judge Pierce found that the matters could not be suppressed because there had been no indictment, citing *United States v. Calandra, supra*, for the proposition that the exclusionary rule does not

apply to grand jury proceedings. Further, Judge Pierce found that Cueto and Nemikin had alleged no facts which, if true, would entitle them to the relief sought. The judge also denied the motion, insofar as it asserted a First Amendment right to suppress, because of the absence of any legal support. The judge also observed, citing *Alderman v. United States*, 394 U.S. 165 (1969) and *Jones v. United States*, 362 U.S. 257 (1960), that Cueto and Nemikin had alleged insufficient facts to persuade the Court that the records sought were their records as opposed to what they clearly appeared to be from the language of the subpoena—records of the Church. Finally and conclusively, Judge Pierce observed that there had been no search and no seizure, simply a subpoena. The denial of the relief sought was proper in all respects and must be affirmed here.

CONCLUSION

The orders of contempt should be affirmed.

Respectfully submitted,

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